

## THE UNITED STATES' REJECTION OF THE INTERNATIONAL CRIMINAL COURT: A STRATEGIC ERROR

BY

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CRIMINAL COURT: A STRATEGIC ERROR**

by

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United States Army Reserve

Topic Approved By  
Colonel (Retired) Kevin Reynolds

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## **ABSTRACT**

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Throughout the Twentieth Century, the international community struggled to find a method of ensuring that those responsible for brutal war crimes and atrocities were held responsible for their actions. These efforts coalesced into the Rome Conference, where the international community sought to fashion an institution that would have the authority to accomplish these tasks, but not trample individual sovereignty. The United States was a major part of these negotiations, but did not accept the result. The Bush administration and Congress have pursued a markedly hostile attitude towards the International Criminal Court (ICC). Failure to accept the Rome Statute constitutes a strategic mistake in the use of the informational and diplomatic elements of power. Given that there is little or no risk that the ICC would impact U.S. military or humanitarian operations, the United States should sign and ratify the Rome Statute.



## THE UNITED STATES' REJECTION OF THE INTERNATIONAL CRIMINAL COURT: A STRATEGIC ERROR

From the Armenian Genocide at its opening through the continuing tragedy of Darfur, the Twentieth Century witnessed numerous atrocities and war crimes. Throughout, the international community struggled to find a method of ensuring that those responsible for these brutal acts were held responsible for their crimes. The *ad hoc* tribunals that resulted have varied in their procedures and effectiveness, and have often led to charges of “victor’s justice.” Therefore, the hope arose that a permanent tribunal, with clearly defined jurisdiction and procedures, would be more effective in addressing the massive crimes that show no sign of disappearing.

In 1990, the United States joined the efforts to establish an international criminal court.<sup>1</sup> These efforts coalesced into the Rome Conference, where the international community sought to fashion an institution that would have the authority to accomplish these tasks, but not trample individual sovereignty. On July 17, 1998, the Conference approved the Rome Statute of the International Criminal Court, the final result of this work. Under the terms of this statute, the International Criminal Court (“ICC”) came into being on July 1, 2002.

The United States was a major part of these negotiations, but did not accept their results. Although President Clinton signed the Rome Statute on December 31, 2000,<sup>2</sup> he announced that he would not forward it to the Senate for confirmation, and recommended that President-elect Bush pursue the same course. Through this action, President Clinton hoped to permit the United States to remain involved in the ICC process.<sup>3</sup> The Bush administration went well beyond this advice. On May 6, 2002, the

United States notified the U.N. Secretary General of its intent not to become a party to the Rome Statute,<sup>4</sup> effectively ending United States participation in the ICC process.

The Bush administration and Congress have pursued a markedly hostile attitude towards the ICC. President Bush made the U.S. refusal to recognize the authority of the ICC a part of his National Security Strategy for 2002,<sup>5</sup> and Congress passed legislation designed to not only shield U.S. personnel from the Court, but to also deny foreign and military aid to countries that participate in the ICC.<sup>6</sup> These actions constitute a strategic mistake in the use of the informational and diplomatic elements of power. Given that there is little or no risk that the ICC would impact on U.S. military or humanitarian operations, the United States should sign and ratify the Rome Statute.

### The Rome Statute

The ICC is an international court within the United Nations system, empowered to exercise jurisdiction over individuals accused of “the most serious crimes of international concerns.”<sup>7</sup> The Court is overseen by the Assembly of States Parties, which consists of one member from each nation that has approved the Statute.<sup>8</sup> The 18 judges of the ICC are divided into a Pre-Trial Chamber, which makes the initial decisions as to what cases will be accepted by the ICC for trial and then assists in the investigative process, and Trial and Appeals Chambers.<sup>9</sup> Judges serve for a term of nine years, and are not eligible for reelection.<sup>10</sup> No more than one judge may be from any nation.<sup>11</sup> Judges may be removed from the Court if they are determined by a majority of the other judges to be exhibiting bias.<sup>12</sup> The ICC also contains the Office of the Prosecutor (OTP), charged with investigating referrals to the Court, recommending whether the case should be accepted, and prosecuting those cases.<sup>13</sup>

The ICC currently has jurisdiction over three crimes: genocide; crimes against humanity; and war crimes.<sup>14</sup> The Statute provides limitations on each of these crimes. Although the statute provides for jurisdiction over the crime of aggression, these provision has not been implemented to date.

Genocide is defined as acts committed with the intent to destroy a national, ethnic, racial or religious group.<sup>15</sup> The key word here is “intent” – a conviction requires proof that the actions taken were designed to destroy a defined group. This requirement will ensure that its reach is limited. A similar restriction is imposed by the definition of crimes against humanity. Prosecution under that section is limited to acts committed as part of “a widespread or systematic attack directed against any civilian population.”<sup>16</sup> Again, conviction under this section requires not only proof that an individual committed any of the specified acts, but that he did so as part of a broader attack directed against the population as a whole.

War crimes constitute the third area of jurisdiction of the ICC. War crimes constitute either grave breaches of the Geneva Conventions of 1949, or other enumerated violations of the law of armed conflict or Common Article 3 of the 1949 Conventions for internal conflicts.<sup>17</sup> Although noting that it is concerned in particular with war crimes committed as part of a larger plan or policy,<sup>18</sup> this section provides the broadest current reach as the limiting language is not mandatory.

The potential reach of the Rome Statute is greatly limited by other provisions. Most important of these is the principle of “complementarity.” The jurisdiction of the ICC does not apply where a state has jurisdiction to investigate and/or prosecute the allegations, unless it is shown that state is unwilling or unable to act.<sup>19</sup> So long as the

investigation of the alleged crime is not a sham, a decision not to prosecute the accused will act as a bar to the ICC taking the case.<sup>20</sup> A state is deemed to be unwilling to investigate an allegation if proceedings are delayed, are initiated to shield the person from criminal liability, or are not independent and impartial.<sup>21</sup> Determinations as to whether a state is unwilling to investigate and/or prosecute an allegation are made by the Pre-Trial Chamber of the Court, and may be appealed to the Appeals Chamber.<sup>22</sup>

Allegations of crimes and requests for investigation are initially referred to the OTP.<sup>23</sup> Allegations can be referred to OTP in three ways. First, a state that has ratified the Rome Statute may refer the alleged crime.<sup>24</sup> Second, the U.N. Security Counsel can refer a situation for investigation.<sup>25</sup> Finally, OTP can initiate an investigation based on information received from other sources.<sup>26</sup> This last provision has caused significant controversy.<sup>27</sup>

Once a referral is received, the OTP is charged with conducting an initial investigation to determine whether there is a reasonable basis to initiate a case.<sup>28</sup> If such a basis is found, the allegations are referred to the Pre-Trial Chamber for authorization of a formal investigation. Only after this approval is the OTP permitted to continue the investigation.<sup>29</sup> The Pre-Trial Chamber can then issue arrest warrants and summonses to assist the Prosecutor in gathering evidence.<sup>30</sup>

If the allegations are considered appropriate for trial, the case is referred to the Trial Chamber.<sup>31</sup> During the trial, the accused has most of the rights that we recognize as essential to fundamental due process. He is presumed innocent, and guilt must be proven beyond a reasonable doubt.<sup>32</sup> Unless the Court determines that evidence constitutes national security information, the proceedings are open and the accused is

entitled to be present unless his behavior becomes disruptive.<sup>33</sup> He is to be given time adequate to consult with an attorney and to prepare a defense, to have an interpreter provided at no cost, and he may not be compelled to testify. Finally, the OTP is required to disclose to the defense any information in his possession that might tend to show the innocence of the accused, or mitigate his responsibility.<sup>34</sup> Either OTP or the accused may appeal the ultimate decision of the Trial Chamber as to guilt or innocence, and the sentence.<sup>35</sup>

The Statute specifically addresses the responsibility of commanders and other superiors for the actions of their subordinates. It holds commanders responsible for the crimes of elements under their control where the commander knew, or should have known, the forces were committing or about to commit the crimes, or where the commander failed to take all necessary and reasonable measures to prevent such crimes or refer them for investigation when they were discovered.<sup>36</sup> The defense of obedience to orders is specifically rejected.<sup>37</sup> These provisions follow the current dictates of the international law of armed conflict.

### U.S. Concerns

Before and after the Rome Statute was adopted, U.S. officials have raised concerns with the Rome Statute. The primary argument raised by the Clinton administration was that the Rome Statute gives the Court potential jurisdiction over citizens of non-party states where a person commits the enumerated crimes on the soil of an ICC member state.<sup>38</sup> Therefore, they worried that U.S. commanders and senior governmental civilians could theoretically be charged for their conduct while engaged in peacekeeping or humanitarian relief efforts. This possibility was seen as an impediment

to the U.S. becoming involved in such operations.<sup>39</sup> This argument, although still presented, is not primarily relied on by the Bush administration.<sup>40</sup>

The Bush administration has focused on arguments concerning the authority of the OTP to initiate investigations with the consent of only two judges. This power, it is argued, opens the possibility of prosecutions based on political considerations. The fear is that the ICC might be used by the international community to punish senior United States commanders, or government officials, for taking actions they deem necessary for U.S. security interests.<sup>41</sup> Indeed, the Prosecutor recently hinted that senior government officials in the Sudan could soon be charged in connection with the situation in Darfur.<sup>42</sup>

Another argument is that the Rome Statute's inclusion of the crime of aggression usurps the role of the U.N. Security Council.<sup>43</sup> Given the lack of international consensus concerning the definition of aggression, this is a real concern. However, this reinforces that the United States should be involved in the process, not awaiting the results.

#### ICC: Action and Inaction

A review of the actions of the ICC over the nearly six years since it has been operating shows that, at least to date, the concerns listed above have proved groundless.

*Uganda.* Approximately 18 months after it came into being, the first matter was referred to OTP for investigation. In December 2003, the government of Uganda referred the situation with the Lord's Resistance Army (LRA) in Northern Uganda to the ICC, and on January 29, 2004, OTP announced that it had opened an investigation.<sup>44</sup> Soon afterwards, the ICC issued its first arrest warrants for five leaders of the LRA, to

include Joseph Kony, its founder.<sup>45</sup> These warrants charged that, as part of a long running insurgency against the government of Uganda, and specifically after the effective date of the ICC's jurisdiction, the LRA had engaged in the "brutalization of civilians," to include murder, kidnapping, sexual enslavement, mutilations, and impressing children as fighters, porters, and sex slaves.<sup>46</sup> The five were charged with 12 counts of crimes against humanity and 21 counts of war crimes. To date, none of the five have been captured.<sup>47</sup>

Two years of peace talks recently seemingly floundered over the issue of the ICC warrants. Under the peace treaty, the Ugandan government agreed to establish a special court to try those accused of crimes connected to the insurgency, and then request that the ICC dismiss its case.<sup>48</sup> The LRA is demanding the withdrawal of the warrants before they disarm,<sup>49</sup> as it is likely the ICC would refuse to return the case to Uganda if it finds that the proposed tribunal would not conduct an adequate investigation and/or prosecution. However, if the ICC warrants are truly the last impediment to peace in Uganda, a refusal to withdraw them will almost certainly lead to a continuation of war crimes and depredations against the civilian population.<sup>50</sup> How the ICC resolves this dilemma will significantly impact its legitimacy in the coming years.

*Democratic Republic of the Congo.* The second referral to the ICC came on March 3, 2004 when Joseph Kabila, President of the DRC, requested that the OTP investigate possible war crimes related to the ongoing ethnic conflict in the Ituri section of that nation. On June 23, 2004, the OTP announced that it had opened an investigation that would focus on the individuals most responsible for "the gravest of war crimes."<sup>51</sup>

On March 17, 2006, Thomas Lubanga, the leader of the Union of Congolese Patriots (UPC), a militia group supported the Hema ethnic group, became the first individual arrested under a warrant issued by the ICC.<sup>52</sup> He was charged with three war crimes related to the conscription and enlisting of children under 15 to participate in hostilities, rather than with the numerous murders, rapes, and other depredations against the opposing Lendu ethnic group of which UPC was suspected. Lubanga's trial is currently scheduled to begin in June, 2008, and will be the first ICC trial.

Arrest warrants were also issued against the leaders of two militia groups that supported the Lendus, Germain Katanga<sup>53</sup> and Mathieu Ngudjolo.<sup>54</sup> Both were turned over to the ICC by Congolese authorities after their subsequent arrest in connection with the murder of nine U.N. Peacekeepers. Kantanga and Ngudjolo were charged with six counts of war crimes and three counts of crimes against humanity in connection with a February 2003 assault on a Hema village. During the attack, more than 200 civilians were murdered, and women and girls were sexually enslaved.<sup>55</sup> They are awaiting a trial date.

*Central African Republic.* The final investigation referred by a member state involves the CAR. This investigation concerns alleged crimes committed by both sides during two coup attempts led by the current President, Francois Bozize. Bozize referred the matter to OTP in December 2004,<sup>56</sup> presumably in an attempt to punish members of the former government and their international supporters. The investigation is notable for two reasons. First, the majority of the alleged crimes concern rape and sexual abuse.<sup>57</sup> Second, the investigation will focus on allegations of criminal conduct by both government and rebel forces during this time period, to include forces controlled by

Bozize.<sup>58</sup> By not limiting the investigation of one side, even where such a limitation was sought by the referring state, the case has demonstrated the objectiveness and neutrality of OTP.

*Darfur.* The final case pending before the ICC involves Darfur, Sudan, and was referred to it by the U.N. Security Council.<sup>59</sup> The U.N. made the referral to the ICC based on the refusal of Sudan's leaders to act effectively to end the continuing violence in Darfur and to investigate the crimes committed there. The U.N. referred the matter on March 31, 2005, and the OTP opened an investigation on June 6 of that year.<sup>60</sup> On February 27, 2007, the OTP filed a lengthy report naming two suspects in the case. One, Ali Kushayb, was a notorious leader of the Janjaweed militia during 2003, the year focused on by the OTP. Kushayb was accused of 51 counts of crimes against humanity and war crimes in connection with attacks on four villages and their surrounding areas. At the time of the attacks, Kushayb was an officer in the Popular Defense Force, a reserve component of the Sudanese military.<sup>61</sup>

The Prosecutor named as a suspect Ahmed Haroun, who at the time of the 2003 attacks was the Minister of State for the Interior of the Government of Sudan and the head of the "Darfur Security Desk." The OTP found that, in this role, Haroun coordinated the efforts of the Sudanese military, police, and intelligence activities in Darfur, particularly with regard to the Janjaweed. In this capacity, he allegedly assisted in the war crimes and crimes against humanity, and so was charged with the same crimes levied against Kushayb.<sup>62</sup>

The decision to name Haroun as a suspect was unexpected.<sup>63</sup> At the time the proposed charges were released, Haroun was serving as the Minister for State for

Humanitarian Affairs, the individual charged with coordinating relief efforts to the refugees in Darfur (a role in which he was much criticized by civilian aid agencies).<sup>64</sup> However, it again demonstrated the dedication of the OTP to the goals of the Rome Statute.

On May 2, 2007, the ICC issued arrest warrants for both men.<sup>65</sup> To date, Sudan's government has refused to turn over either man as a result of these warrants, and disputes the jurisdiction of the ICC in the matter as it claims its courts are capable of investigation and prosecution.<sup>66</sup> As a further slap in the face of the ICC and the international community at large, in September 2007 the government of the Sudan announced that Haroun had been appointed to lead its investigation into human rights abuses in Darfur.<sup>67</sup>

The Prosecutor recently disclosed that his office is nearly ready to present evidence concerning the refusal of Sudan to surrender Haroun and Kushayb, and an investigation into those "who bear the greatest responsibility for ongoing and systematic attacks against civilians in Darfur," which most believe will lead to charges against Sudan's top leadership.<sup>68</sup> Critics could argue that such a decision would raise concerns that only the war crimes of one side are being investigated by the ICC in Darfur. Such an investigation could be painted as a selective, and political, prosecution.<sup>69</sup> However, the ICC is charged not with investigating all attacks on non-combatants, but larger, genocide-style attacks. While the rebels in Darfur have attacked civilians, their conduct has not risen to this level. So, again, the OTP is following its charge.

The United States was torn on the Darfur vote. Acknowledging that genocide was occurring in Darfur,<sup>70</sup> the administration attempted to obtain support for the

appointment of an international commission of inquiry rather than support a referral to the ICC. When it became clear that this option had little support and that the situation would be referred to the ICC absent a veto, U.S. representatives requested a provision that specified the ICC could not take action against citizens of non-ICC members. The Security Council agreed to this addition, and the United State abstained from the vote.<sup>71</sup> The United States was influenced, at least in part, by the importance of having the international community speak with one voice on the situation in Darfur.<sup>72</sup> Since the referral, the United States has indicated that it would be willing to consider providing assistance to the ICC investigation and subsequent prosecution, within the constraints of U.S. law.<sup>73</sup> As the ICC has made no such request to date, the extent of this promise is unclear. It is also unclear what constraints the provisions of the American Servicemember's Protection Act, discussed below, would place on any such request.

*Iraq.* As significant as the cases pursued by the OTP are the cases refused. As of February 10, 2006, the OTP had received 1,732 communications requesting it open investigations.<sup>74</sup> Of those, only ten situations were analyzed, with four accepted (discussed above), five ongoing, and two dismissed.<sup>75</sup> The dismissal included allegations of war crimes by Coalition forces in Iraq.

In its published memorandum concerning this decision, the OTP noted that it had received over 240 communications urging an investigation into the U.S. invasion of Iraq, and the subsequent Abu Ghraib scandal.<sup>76</sup> Despite this volume, the broad international resistance to the U.S. invasion, and world-wide outrage at the treatment of detainees, the OTP refused to open an investigation. This decision was based in part on an obvious jurisdictional defect - Iraq was not a signatory to the Rome Statute.<sup>77</sup>

However, the OTP did not stop the analysis there. They went on to note that they found no evidence that “Coalition forces had [the] ‘intent to destroy, in whole or in part, a national, ethnic, racial or religious group.’” Therefore, it rejected a possible investigation into the crime of genocide.<sup>78</sup> The OTP went on to discuss allegations of war crimes related to the death of civilians during the “force on force” portion of the conflict.<sup>79</sup> The Prosecutor found that U.S. and U.K. forces had done intensive target analysis prior to the conflict designed to minimize civilian casualties, that they had legal advice available before and during the war, and that they continued to evaluate necessity and proportionality throughout. Therefore, the OTP determined that civilian populations were not intentionally targeted, and that in general civilian casualties did not result from war crimes.<sup>80</sup>

The Prosecutor did find that allegations of the willful killing of from four to twelve civilians and a limited number of victims of inhuman treatment, for a total number of less than 20 persons, could be substantiated. The OTP found that such a limited number of possible war crimes did not rise to the level of gravity that would invoke the jurisdiction of the ICC.<sup>81</sup> Based on this determination, the OTP did not evaluate whether the principle of “complementarity” would prevent jurisdiction. However, the Prosecutor did note with approval that in each of the incidents that were identified as potential war crimes, U.S. and/or U.K officials had initiated investigations.<sup>82</sup>

The actions of OTP regarding Iraq refute the allegations that the ICC will engage in political prosecutions based on the actions of soldiers in the field. The OTP could have drafted a very narrow response to the allegations. Instead, they used the memorandum to discuss the limitations the Rome Statute places on potential

prosecutions. OTP specifically found that the U.S. actions did not constitute genocide, as some had urged. Perhaps most importantly, OTP found that the concept of “gravity” under the Rome Statute is a crucial component of the ICC’s jurisdiction, and that investigations will be opened only for the most serious war crimes. This is precisely what the ICC was designed to accomplish. The breadth of this opinion no doubt disappointed many signatories of the Rome Statute. However, this action demonstrated that OTP and the ICC are extremely unlikely to engage in politicized prosecutions, as feared.

It should be noted that the memorandum specifically does not address whether the U.S. invasion constituted the crime of aggression, as the ICC does not have jurisdiction over that offense. This topic will remain a concern of observers of the ICC until such time as that offense is defined, which will happen no sooner than 2010.<sup>83</sup> The ability to influence this discussion provides a strong argument for the U.S. to join the ICC system. While it is likely that aggression will be defined consistent with common international law, as was done when proportionality was written into the Rome Statute, and that the ICC will not seek to expand this definition to situations (such as Iraq) that do not fall squarely within the current definitions, our decision not to join with the international community in this debate may thus have significant strategic consequences.

#### U.S. Actions to Limit the ICC

The United States has taken specific actions to limit the reach of the ICC. Article 98 of the Rome Statute provides that the ICC must respect agreements between states that deprive one state of turning over citizens of another that are acting in an official

capacity to the ICC without the consent of both states.<sup>84</sup> This provision is similar to those contained in Status of Forces agreements routinely negotiated by the U.S. and other nations.<sup>85</sup> The United States has negotiated 100 such agreements,<sup>86</sup> some with nations that are not a party to the Rome Statute.<sup>87</sup> The European Council initially balked at allowing its members to sign such agreements, but finally relented so long as the agreements were narrowly tailored.<sup>88</sup>

In 2002, Congress passed the American Servicemembers' Protection Act (ASPA) as part of the Supplemental Appropriations Act,<sup>89</sup> which President Bush signed into law on August 2, 2002.<sup>90</sup> The ASPA was first introduced by Jesse Helms in 2000.<sup>91</sup> Although unsuccessful as a stand-alone bill in 2000 and 2001, the bill was successful as a rider to the Supplemental Appropriations Act after 9/11.<sup>92</sup> Under the ASPA, no State or federal government agency (to include courts) may cooperate with requests for assistance by the ICC, provide any financial assistance with appropriated funds, or turnover any person to the Court.<sup>93</sup> Nor may the ICC conduct any type of investigation into allegations of crimes by any person (even a non-U.S. citizen) on U.S. soil.<sup>94</sup> The Act also prohibits the participation of U.S. forces in any U.N. peacekeeping mission authorized by the Security Council, unless the resolution authorizing the mission specifically exempts U.S. forces from ICC jurisdiction, or unless the receiving nation has signed an Article 98 agreement with the U.S.<sup>95</sup> The President is authorized to essentially ignore this prohibition if he certifies to Congress that the national interests of the U.S. require participation in the mission.<sup>96</sup>

The ASPA authorizes the President to use "all means necessary and appropriate" to free any U.S. service member or official detained by the ICC.<sup>97</sup> This

provision caused great ridicule, including referrals to the ASPA as “the Hague Invasion Act.”<sup>98</sup> In testimony before Congress, David Sheffer, the lead U.S. representative at the ICC negotiations, characterized this section as “an alarmist provision that only complicates our ability to negotiate our common objective of protection [of U.S. personnel] from prosecution.”<sup>99</sup>

Significantly, the ASPA states that its provisions do not prohibit the United States from assisting in international efforts to “bring to justice Saddam Hussein, Slobodan Milosovic, Osama Bin Laden and other leaders of al-Queda . . . , and other foreign nationals accused of genocide, war crimes, or crimes against humanity.”<sup>100</sup> This provision could be interpreted so broadly as to undercut completely the restrictions against cooperation with the ICC in the case of non-U.S. citizens.

The Clinton administration opposed the ASPA for a number of reasons, mostly related to its potential infringement on the President’s authority to conduct foreign relations and as commander-in-chief.<sup>101</sup> The Department of Justice expressed doubts as to the constitutionality of numerous provisions of the statute, including the restrictions on complying with international judicial requests for assistance or providing assistance to law enforcement authorities.<sup>102</sup> Despite these objections, the ASPA was passed overwhelmingly.<sup>103</sup> The Bush administration has used the ASPA to pressure nations to sign Article 98 agreements under the threat of the loss of foreign aid.<sup>104</sup> These actions contributed to the EU’s initial prohibition against the signing of such agreements.<sup>105</sup>

This statute is a serious strategic mistake. It complicates our national security and foreign policy interests, and gives support to the impression that the U.S has no interest in cooperating in or abiding by international law, unless that law happens to act

for our benefit. As such, it undermines the information and diplomatic areas of power. It is much too harsh a reaction to the perceived problems with the ICC. Further, its coercive use by the Bush administration in its campaign against the ICC has alienated international public opinion. Finally, if it is indeed the case that the “tails” of Presidential waivers and the ability to assist international efforts to apprehend war criminals was the “dog” of the rest of the statute, it is unclear what practical (as opposed to political) utility the statute possesses. Its repeal could help restore credibility to the United States’ efforts in world affairs.

#### The U.S. Should Join the ICC

There is admittedly a limited amount of information from which to draw conclusions about the ICC. However, the court’s actions over the last six years directly refute many of the concerns expressed at its creation. First, the ICC has focused its prosecutions on the leaders of war crimes, not individual perpetrators, as it was designed to do. Second, the ICC has accepted jurisdiction over cases where there is evidence of massive systematic, not sporadic, war crimes and crimes against humanity. Again, this is in line with the intent of the drafters of the Rome Statute that the Court investigate and punish those responsible for large scale atrocities. Given the Court’s adherence to these basic principles, the ICC would have little impact on individual U.S. soldiers involved in military or humanitarian missions should the U.S. decide to join the ICC structure.<sup>106</sup>

The focus on commanders and civilian leaders would also likely have little or no impact on these operations. The crimes under the jurisdiction of the ICC are essentially identical to those already proscribed by the Geneva and Hague Conventions.

Commanders and civilian leaders who engaged in such actions would be subject to courts-martial or trial by a civilian court. The fact that the United States has such forums available would, under the principle of complementarity, prevent the ICC from exercising jurisdiction in cases where such allegations would be made.<sup>107</sup>

That this is the case has already been demonstrated by the OTP in its decision not to open an investigation into Iraq. As discussed above, the OTP could have written a narrow decision, based on the fact that Iraq was not a member state. However, the OTP went on to explain that, while evidence existed of some war crimes, the number of such possible crimes did not rise to the level of gravity appropriate for an ICC prosecution. The OTP also noted with favor the fact that investigations were being pursued in each of these cases. This document serves as a clear signal that the two limiting factors of gravity and complementarity are important checks on the power of the ICC, and that these checks will be observed.

The decision not to open an investigation into U.S. and Coalition action in Iraq, along with an examination of the actions taken by the ICC so far, also refutes the claim that the ICC will engage in political prosecutions. The ICC has not to date sought to prosecute any individual or investigate any situation because those actions are unpopular world-wide. Instead, it has limited itself to actions against horrific and large-scale atrocities that the international community has not been able to adequately address. Through action and inaction, the OTP and the ICC have proven that they intend to operate according to its mandate.

Further, the structure of the ICC makes it nearly impossible for a political prosecution to occur. The OTP must secure the vote of at least two judges from the

Pre-Trial chamber to launch a full-scale investigation. Then, the matter is referred to the judges of the Trial Chamber for the actual trial. Any result can be appealed to the Appellate Chamber. To engage in a political prosecution would require a conspiracy involving the majority of the judges of each of these separate chambers. The odds against such an occurrence are astronomical.

These odds could change significantly once the crime of aggression is added to the ICC's jurisdiction. Aggression as a war crime was charged at Nuremburg, and is a long standing concept in international law. The danger, of course, is that the Rome Statute will add a definition that would include U.S. actions under its current strategy of preventative war. Again, it is unlikely that such a broad definition will be adopted, given that international law recognizes that the right of self-defense includes the right to strike first in some instances.<sup>108</sup> However, U.S. involvement in the negotiation process on this issue would help minimize even further the chance of an overbroad definition. It is this involvement in the ICC process, sought by the Clinton administration but rejected by President Bush, that the U.S. should be seeking.

As demonstrated above, there is little chance of harm from the U.S joining the nations that have adopted the ICC. But are there benefits, other than an ability to help define aggression? The answer is a resounding yes. The United States is currently engaged in an international struggle over ideas. Whether this is defined as the War on Terror or a Clash of Civilizations, America's ability to remain secure and to advance its interests in the diplomatic and economic spheres relies in large part on our success in this struggle. Currently, the U.S. is hampered in these efforts by the opinion of the international community that America is only willing to participate in the international

process when assured the decision will come out in its favor. Any action that supports the impression that the U.S. seeks to exempt itself from the norms and restrictions of international law is a blow to U.S. interests. Such actions are made worse when Congress passes legislation of doubtful constitutional validity that subjects the United States to world-wide ridicule.

Joining the ICC would send a strong message to the international community that the United States is interested in finding a solution to the horrendous crimes that too often occurred in the past century. It would also provide strategic value to our efforts in the war of ideas. Given that the risk of impact on our military operations is extraordinarily low, and the value to be gained so potentially high, the United States should immediately sign the Rome Statute and ratify the treaty.

## Endnotes

<sup>1</sup> Jennifer K. Elsea, U.S. Policy Regarding the International Criminal Court, Congressional Research Service, Library of Congress, CRS Report RL31495, page 3 (Updated August 29, 2006); John B. Bellinger, Legal Advisor to the Secretary of State, Remarks to DePaul University College of Law "The United States and the International Criminal Court: Where We've Been and Where We're Going," April 25, 2008, available at <http://www.state.gov/s/l/rls/104053.htm>; Internet, last accessed April 26, 2008.

<sup>2</sup> Elsea, 3.

<sup>3</sup> Bellinger remarks.

<sup>4</sup> Marc Grossman Under Secretary for Political Affairs, Remarks to the Center for Strategic and International Studies, Washington, DC, "American Foreign Policy and the International Criminal Court," May 6, 2002, available at <http://www.state.gov/p/us/rm/9949.htm>; Internet, last accessed April 30, 2008.

<sup>5</sup> George W. Bush, National Security Strategy of the United States of America (Washington, DC: The White House, September 2002), 31.

<sup>6</sup> See American Servicemember's Protection Act, P.L. 107-206, title II, 16 Stat. 899 (2002), codified at 22 U.S.C. § 7421 et. seq.

<sup>7</sup> Rome Statute of the International Criminal Court ("Rome Statute"), available at <http://www.icc-cpi.int/about.html>; Internet, last accessed April 29, 2008. Art. 1.

<sup>8</sup> Ibid., Art. 112.

<sup>9</sup> Ibid., Art. 39.

<sup>10</sup> Ibid. New elections for judges occur every three years. In order to implement this provision, one-third of the original judges were nominated for three year terms, and one-third for six years. Those judges are eligible for reappointment.

<sup>11</sup> Ibid.

<sup>12</sup> Ibid., Arts. 41-42.

<sup>13</sup> Ibid., Art. 42.

<sup>14</sup> Ibid., Art. 5.

<sup>15</sup> Ibid., Art. 6.

<sup>16</sup> Ibid., Art. 7.

<sup>17</sup> Ibid., Art. 8.

<sup>18</sup> Ibid.

<sup>19</sup> Ibid., Art. 17.

<sup>20</sup> Ibid.

<sup>21</sup> Ibid.

<sup>22</sup> Ibid., Art. 18.

<sup>23</sup> Ibid., Art. 53.

<sup>24</sup> Ibid., Arts. 13,14.

<sup>25</sup> Ibid., Art. 13.

<sup>26</sup> Ibid., Arts. 13, 15.

<sup>27</sup> Bellinger remarks. David J. Scheffer, Ambassador-at-Large for War Crimes Issues and Head of the U.S. Delegation to the U.N. Diplomatic Conference on the Establishment of a Permanent International Criminal Court, U.S. Department of State, "Developments at Rome Treaty Conference," Testimony Before the Senate Foreign Relations Committee, Washington, DC, July 23, 1998; available at [http://www.state.gov/www/policy\\_remarks/1998/980723\\_scheffer\\_icc.html](http://www.state.gov/www/policy_remarks/1998/980723_scheffer_icc.html) Internet, last accessed May 4, 2008.

<sup>28</sup> Ibid., Arts. 15, 54.

<sup>29</sup> Ibid., Art. 57.

<sup>30</sup> Ibid.

<sup>31</sup> Ibid., Art. 64.

<sup>32</sup> Ibid., Art. 67. Interestingly, the Court does permit evidence obtained “by means of a violation of this Statute or internationally recognized human rights” unless there is a showing that the violation casts substantial doubt on its reliability, of the admission of the evidence would seriously damage the integrity of the proceedings. Ibid., Art. 69. The statute also does not provide for a jury trial. These provisions are remarkably similar to those sought by the Bush administration in connection with the military tribunals currently being conducted. Presumably, this is why the administration does not object to the Rome Statute on due process grounds.

<sup>33</sup> Ibid., Arts. 63, 64 and 70.

<sup>34</sup> Ibid., Art. 65.

<sup>35</sup> Ibid., Art. 81.

<sup>36</sup> Ibid., Art. 28.

<sup>37</sup> Ibid., Art. 33.

<sup>38</sup> Scheffer testimony, July 23 1998; David J. Scheffer, Ambassador-at-Large for War Crimes Issues and Head of the U.S. Delegation to the UN Diplomatic Conference on the Establishment of a Permanent International Criminal Court U.S. Department of State, “The International Criminal Court,” Remarks before the 6th Committee of the 53rd General Assembly, New York, October 21, 1998, available at [http://www.state.gov/www/policy\\_remarks/1998/981021\\_scheffer\\_icc.html](http://www.state.gov/www/policy_remarks/1998/981021_scheffer_icc.html) Internet, last accessed May 4, 2008; Bellinger remarks; Elsea, 5-6.

<sup>39</sup> Ibid.

<sup>40</sup> Grossman remarks; Bellinger remarks.

<sup>41</sup> Ibid.; Elsea, 7.

<sup>42</sup> Nora Boustany, “Rights Groups Launch Campaign to Press for Darfur Arrests,” Washington Post, April 26, 2008, p. A13.

<sup>43</sup> Elsea, 8; Grossman remarks.

<sup>44</sup> International Criminal Court, Press Release, “President of Uganda refers situation concerning the Lord’s Resistance Army (LRA) to the ICC,” January 29, 2004, available at [http://www.icc-cpi.int/pressrelease\\_details&id=16&l=en.html](http://www.icc-cpi.int/pressrelease_details&id=16&l=en.html); Internet, last accessed April 28, 2008.

<sup>45</sup> International Criminal Court, Press Release, "Warrant of arrest unsealed against five LRA commanders," October 14, 2005, available at [http://www.icc-cpi.int/pressrelease\\_details&id=114&l=en.html](http://www.icc-cpi.int/pressrelease_details&id=114&l=en.html); Internet, last accessed April 25, 2008.

<sup>46</sup> International Criminal Court, "Warrant of Arrest for Joseph Kony," September 27, 2005, available at [http://www.icc-cpi.int/library/cases/ICC-02-04-01-05-53\\_English.pdf](http://www.icc-cpi.int/library/cases/ICC-02-04-01-05-53_English.pdf); Internet, last accessed April 28, 2008.

<sup>47</sup> Although at least one has been killed, and the arrest warrant therefore withdrawn.

<sup>48</sup> Nora Boustany, "Ugandan Rebel Reaches Out to International Court," *Washington Post*, March 19, 2008, page A12.

<sup>49</sup> Around the Word, "Rebel Leader's Condition for Deal," *Washington Post*, April 12, 2008, page A11; Michael Gerson, "To End a Nightmare," *Washington Post* Op-Ed Column, October 17, 2007, page A17; Nora Boustany, "For Ugandan Rebel, A Question of Justice," *Washington Post*, July 17, 2007, page A18.

<sup>50</sup> Francis Kwera, "Ugandan Rebels Kidnap 350 People:Amnesty," *Reuters*, April 22, 2008, available at <http://africa.reuters.com/country/UG/news/usnL22043611.html>; Internet, last accessed April 28, 2008. This standoff highlights the inherent conflict between criminal punishment and the recent trend towards "reconciliation" tribunals designed to reveal crimes but not impose punishment. Given that the LRA leaders are extremely unlikely to subject themselves to the real possibility of punishment for their crimes as part of a peace treaty, Uganda likely has no intention of holding the LRA leaders accountable for their actions. If the ICC agrees to a withdrawal, it would violate its charter, and set a precedent for other nations to use ICC arrest warrants as mere bargaining chips.

<sup>51</sup> International Criminal Court, Press Release, "The Office of the Prosecutor of the International Criminal Court opens its first investigation," June 23, 2004, available at [http://www.icc-cpi.int/pressrelease\\_details&id=26&l=en.html](http://www.icc-cpi.int/pressrelease_details&id=26&l=en.html) Internet, last accessed April 29, 2008.

<sup>52</sup> International Criminal Court, Press Release, "First Arrest for the International Criminal Court," March 17, 2006, available at <http://www.icc-cpi.int/press/pressreleases/132.html> Internet, last accessed April 29, 2008.

<sup>53</sup> International Criminal Court, Arrest Warrant for Germain Katanga, July 2, 2007, available at [http://www.icc-cpi.int/library/cases/ICC-01-04-01-07-1\\_tEnglish.pdf](http://www.icc-cpi.int/library/cases/ICC-01-04-01-07-1_tEnglish.pdf) Internet, last accessed April 29, 2008.

<sup>54</sup> International Criminal Court, Arrest Warrant for Mathieu Ngudjolo Chui, July 2, 2007, available at <http://www.icc-cpi.int/library/cases/ICC-01-04-02-07-1-tENG.pdf> Internet, last accessed April 29, 2008.

<sup>55</sup> See links at notes 53 and 54, above.

<sup>56</sup> International Criminal Court, "Decision assigning the situation in the Central African Republic to Pre-Trial Chamber III," January 19, 2005, available at [http://www.icc-cpi.int/cases/RCA/s0105/s0105\\_doc.html](http://www.icc-cpi.int/cases/RCA/s0105/s0105_doc.html); Internet, last accessed April 26, 2008.

<sup>57</sup> International Criminal Court, Press Release, "Prosecutor opens investigation in the Central African Republic," May 27, 2007, available at [http://www.icc-cpi.int/library/press/pressreleases/ICC-OTP-BN-20070522-220\\_A\\_EN.pdf](http://www.icc-cpi.int/library/press/pressreleases/ICC-OTP-BN-20070522-220_A_EN.pdf) Internet, last accessed April 29, 2008. An investigation was not authorized until May 2007

<sup>58</sup> Pascal Fletcher, "ICC vows 'no impunity' for African war criminals," *Reuters*, February 7, 2008, available at <http://africa.reuters.com/top/news/usnBAN753841.html> Internet, last accessed April 28, 2008.

<sup>59</sup> United Nations Security Council Resolution 1593, March 31, 2005, available at <http://daccess-ods.un.org/TMP/3364292.html> Internet, last accessed April 26, 2008.

<sup>60</sup> International Criminal Court, Situations and case, Darfur, Sudan, available at <http://www.icc-cpi.int/cases/Darfur/s0205.html> Internet, last accessed April 27, 2008.

<sup>61</sup> *Ibid.*; Prosecutor's Application under Article 58(7), February 27, 2007, available at [http://www.icc-cpi.int/cases/RDC/s0205/s0205\\_docOTP.html](http://www.icc-cpi.int/cases/RDC/s0205/s0205_docOTP.html) Internet, last accessed April 27, 2008.

<sup>62</sup> *Ibid.*

<sup>63</sup> Johan Fisher, "ICC Claims Further Isolate Sudan," BBC News, February 27, 2007, available at <http://news.bbc.co.uk/2/hi/africa/6401607.stm> Internet, last accessed April 23, 2008.

<sup>64</sup> *Ibid.*

<sup>65</sup> Alexandra Hudson, "ICC judges issue arrest warrants for Darfur suspects," *Reuters*, May 2, 2007, available at <http://www.reuters.com/article/worldNews/idUSL0272465320070502> Internet, last accessed April 28, 2008.

<sup>66</sup> *Ibid.* Kushayb was recently released from a Sudanese prison where he was serving a sentence crimes unrelated to Darfur. Boustany, *Washington Post*, April 26, 2008.

<sup>67</sup> Rob Creely, "War Crime suspect heads human rights inquiry," *The Times*, September 7, 2007, available at <http://news.bbc.co.uk/2/hi/africa/6399311.stm> Internet, last accessed April 29, 2008.

<sup>68</sup> Boustany, *Washington Post*, April 26.

<sup>69</sup> Fisher.

<sup>70</sup> USUN Press Release, "Explanation of Vote by Ambassador Anne W. Patterson, Acting U.S. Representative to the United Nations, on the Sudan Accountability Resolution, in the Security Council, March 31, 2005," available at [http://www.usunnewyork.usmission.gov/press\\_releases/20050331\\_055.html](http://www.usunnewyork.usmission.gov/press_releases/20050331_055.html); Internet, last accessed April 28, 2008.

<sup>71</sup> The final vote tally for the resolution was 11 for, 0 against, and 4 abstentions (United States, China, Algeria, and Brazil). Elsea, 25.

<sup>72</sup> USUN Press Release, March 31, 2005.

<sup>73</sup> Bellinger remarks; Nora Boustany, "Official Floats Possibility of Assistance to Hague Court," Washington Post, June 12, 2007, page A20.

<sup>74</sup> International Criminal Court, Office of the Prosecutor, Communications Received, "Update on Communications Received by the Prosecutor," February 10, 2006, available at [http://www.icc-cpi.int/library/organs/otp/OTP\\_Update\\_on\\_Communications\\_10\\_February\\_2006.pdf](http://www.icc-cpi.int/library/organs/otp/OTP_Update_on_Communications_10_February_2006.pdf) Internet, last accessed April 30, 2008.

<sup>75</sup> Ibid.

<sup>76</sup> International Criminal Court, Office of the Prosecutor, "Iraq Response," February 10, 2006, available at [http://www.icc-cpi.int/library/organs/otp/OTP\\_letter\\_to\\_senders\\_re\\_Iraq\\_9\\_February\\_2006.pdf](http://www.icc-cpi.int/library/organs/otp/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf) Internet, last accessed April 30, 2008.

<sup>77</sup> Ibid., 3.

<sup>78</sup> Ibid., 4-5. The Prosecutor also found that the use of cluster munitions did not constitute a war crime, as those weapons were not specifically banned under international law.

<sup>79</sup> Ibid. 5. The OTP noted that, under international law and the Rome Statute, the death of civilians does not automatically result in a war crime.

<sup>80</sup> Ibid, 6-7. The Prosecutor found the use of precision guided weapons to be another factor supporting the conclusion that efforts were made to minimize civilian casualties. Ibid., 7.

<sup>81</sup> Ibid., 8 – 9.

<sup>82</sup> Ibid., 9.

<sup>83</sup> Bellinger remarks.

<sup>84</sup> Rome Statute, Art. 98.

<sup>85</sup> Elsea, 26.

<sup>86</sup> Press Release, U.S. Department of State, "U.S. Signs 100<sup>th</sup> Article 98 Agreement," May 3, 2005, available at <http://www.state.gov/r/pa/prs/ps/2005/45573.htm>; Internet, last accessed April 29, 2008.

<sup>87</sup> Elsea, 26.

<sup>88</sup> Ibid., 27.

<sup>89</sup> P.L. 107-206, title II, 16 Stat. 899 (2002), codified at 22 U.S.C. § 7421 et. seq.

<sup>90</sup> Elsea, 10.

<sup>91</sup> S. 2726 (2000).

<sup>92</sup> Lilian V. Faulhaber, Recent Development, "American Servicemembers' Protection Act of 2002," Harv. J. on Legis., Vol. 40, No. 2, Summer 2003, pages 544 – 545.

<sup>93</sup> 22 U.S.C. § 7423.

<sup>94</sup> Ibid.

<sup>95</sup> 22 U.S.C. § 7424.

<sup>96</sup> Ibid. The ASPA also originally prohibited military assistance, defined extremely broadly, to ICC member countries except for NATO countries and major non-NATO allies, unless the President waived the restrictions. That section of the law was repealed on January 28, 2008 by the 2008 National Defense Authorization Act. Pub. Law 110-181, Div. A, Title XII, Subtitle A, §1212(a), 122 Stat. 371 (2008).

<sup>97</sup> 22 U.S.C. § 7427. The statute does not require the use of force, of course. Indeed, it provides that U.S. officials may instead decide to represent these individuals before the ICC. Although the statute seems to authorize a combat mission to The Hague, the use of bribes to free prisoners is specifically prohibited.

<sup>98</sup> Faulhaber, 546; see also Human Rights Watch, Press Release, "Hague Invasion Act Becomes Law", August 3, 2002, available at <http://www.hrw.org/press/2002/08/aspa080302.htm> Internet, last accessed April 29, 2008.

<sup>99</sup> David J. Scheffer, Ambassador at Large for War Crimes Issues and Head of the U.S. Delegation to the United Nations Preparatory Commission for the International Criminal Court, to House International Relations Committee, July 26, 2000, available at [http://www.iccnw.org/documents/US\\_Scheffer\\_ASPATestimony\\_26Jul00.pdf](http://www.iccnw.org/documents/US_Scheffer_ASPATestimony_26Jul00.pdf) Internet: last accessed April 29, 2008.

<sup>100</sup> 22 U.S.C. § 7433.

<sup>101</sup> Scheff Testimony to House International Relations Committee, July 26, 2000.

<sup>102</sup> Ibid.

<sup>103</sup> The final vote in the Senate was 75-19. Senators Clinton, McCain, Reid, and McConnell all voted for the Act.

<sup>104</sup> Nicholas Kristof, "Schoolyard Bully Diplomacy," New York Times, Op-Ed, October 16, 2005, page A 24; Faulhaber, 554, 555.

<sup>105</sup> Faulhaber, 555.

<sup>106</sup> Further, peacekeeping/humanitarian missions from the UNSC routinely have provisions protecting participants in these missions. Marten Zwanenburg, "The Statute for an International Criminal Court and the United States: Peacekeepers under Fire?" 10 European Journal of International Law 124, 127 - 129 (1999).

<sup>107</sup> Jordan J. Paust, "The Reach of ICC Jurisdiction over Non-Signatory Nationals," 33 Vand. J. Transnat'l L. 1 (2000).

<sup>108</sup> U.N. Charter, Article 51.